

ENVIRONMENTAL ADVISORY COUNCIL
Lansing, Michigan
Thursday, October 16, 2008, 1:00 – 4:00 p.m.

Environmental Advisory Council (EAC) Members in attendance: Sandra Batie, Steve Chester, David Gard, Jeff Haynes, Larry Merritt, Del Rector, Richard Rediske, Doug Roberts, David Rinard, Lee Schwartz, Andy Such, and Paul Zuger.

Department of Environmental Quality (DEQ) Staff in attendance: Patty Brandt, Mike Bricker, George Bruchmann, Bill Creal, Kim Fish, Amy Hicks, Heidi Hollenbach, Steve LaChance, Lynelle Marolf, Becky Patrick, Frank Ruswick, Liane Shekter Smith, and Jim Sygo.

Other Guests in attendance: Lloyd Dunlap (Atlantic Richfield) and John Griffin (American Petroleum Institute).

OPENING

Frank Ruswick opened the meeting by welcoming EAC members, DEQ staff, and guests. DEQ staff introduced themselves to the members.

CURRENT ISSUES

Director Steve Chester invited attendees to the following:

October 20, 2008: a town hall meeting will be held in Southeast Detroit, from 6:00 p.m. to 8:30 p.m. It will allow community members to raise their environmental and public health concerns to Director Chester. The DEQ recently issued a permit to Marathon Oil for a refinery expansion in this area. The local community will have an opportunity to share its concerns about the facility. Director Chester noted that Marathon Oil voluntarily undertook activities beyond strict permit requirements in order to help address environmental and public health concerns of the community.

November 6, 2008: there will be a briefing on DEQ's proposed fees and all stakeholders who may be impacted by the fees are being invited to attend. There will be a general briefing session, and then break out sessions for more detailed discussions of individual programs.

November 7, 2008: there will be a meeting in Detroit to discuss Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, and the proposed changes to the program. The Detroit Regional Chamber of Commerce is

hosting the meeting, but it will involve a variety of stakeholders. There is limited capacity with seating for only 60. A webcast is also being planned. If any member would like to participate, MaryBeth Thelen can provide further details.

A member offered a compliment about Laura Verona who works for the Air Quality Division in Warren. Director Chester indicated he would share this compliment with her.

DISCUSSION

Frank Ruswick suggested the discussion begin on possible recommendations relating to the development and use of guidance documents. He thanked the two members who had prepared materials to begin working from. He suggested the EAC begin with review of the chart summarizing the “needs” related to guidance documents as discussed at the September meeting. See Attachment 1.

The member summarized the chart he prepared:

- The term internal guidance is used throughout the outline.
- The table is broken into two groups: common needs and differing needs.
- The table identifies an issue and then describes it from DEQ, regulated community and public’s needs.
- When a guidance document needs updating, all three parties should meet and offer feedback.
- The DEQ needs clear procedures on how to implement its programs.
- The DEQ should apply the same rules and laws throughout the state. The issue of consistency needs to be addressed.
- The DEQ should assure Michigan is a business-friendly state.
- The DEQ should avoid guidance documents that constitute an administrative rule.
- The DEQ needs to be flexible, responsive, and consistent to statute and rules as they apply to internal guidance documents.

Frank Ruswick opened the floor for feedback.

A member commented that if the decision leads to a permit or an appealable document (e.g., cleanup order), one would appeal under the administrative appeal process. In that case, the DEQ cannot simply justify its decision on the basis of the internal guidance document; it has to be justified on the basis of the underlying statute and rules.

Another member expressed concern about guidance documents on the interpretation of rules and laws. He suggested the guidance document be direction to follow and not guidance on the interpretation of law. He is concerned that articulating a legal interpretation in a guidance document provides it a greater degree of certainty and authority than it deserves. Another member suggested that guidance documents

essentially establish how the DEQ would generally respond to a given situation. In effect, the guidance document creates a presumption about how the DEQ would act. Other members supported this idea.

Several EAC members indicated they see a value in knowing the DEQ's position in advance rather than waiting to be surprised in, for example, a contested case decision. These positions should be established in writing and be easily available on the DEQ's Web site. The U.S. Environmental Protection Agency (U.S. EPA) has indexes on its Web site on to various documents describing how it will interpret the laws it administers. The U.S. EPA letters are very clear. The DEQ should do the same, but should exercise judgment on what is made available. There is little value in posting documents on purely internal procedural matters. The EAC generally supported this concept.

An EAC member talked about the large number of contested cases since 1995 that are Land and Water Management (LWMD) cases. It might be beneficial to describe the common threads of these decisions and the policies thus established. Kim Fish indicated this would be extremely beneficial, but with the lack of staff and funding, it has been very difficult to do.

Frank Ruswick described his sense that the EAC appears to support the information as presented in this chart. The EAC agreed. Frank suggested that we determine how this information will be presented until the report presenting the EAC's recommendations is developed.

Frank turned to the list of draft recommendations. See Attachment 2.

The member who had developed this draft summarized the recommendations:

- The first and last sections are the most critical (i.e. Why is it Needed? and Internal/External Calibration).
- Everyone needs to understand why it was decided to produce an op memo.
- Other important information is what have other states done and, if Michigan is going to be different, why?
- There should be a template for each division to use so the regulated community understands it.
- Guidance documents should be placed in a central location on Web site and distributed through e-mail list servers.
- It is important that there be Internal training and external calibration with associations or stakeholder groups.

Frank Ruswick led the EAC through a discussion of the proposed recommendations by section.

Section One: Why is it Needed?

There was discussion about the sequence and steps in determining if a guidance document is needed and developing it. The DEQ should make an initial internal decision about the need for a guidance document and then assess that conclusion after working with interest groups after steps to develop the proposed guidance.

Frank reminded the EAC that the term “guidance document” has been used to denote a wide range of types of guidance. He summarized the discussion at the June meeting which categorized these documents into one of four categories depending on whether the document was primarily procedural or substantive and primarily internal to the DEQ or with implications to parties outside the DEQ. The EAC agreed that the recommendations being developed at this point are focused on those guidance documents that are primarily substantive and have implications for parties outside the DEQ. It was agreed to call this category “policy statements.” The EAC understood that the term “Op Memo” applies to an example of a policy statement, but there could be other types as well.

Section Two: How is it Developed?

The EAC recognized that policy statements could occur in different contexts. Therefore, it is important that the DEQ explain to stakeholders the reason for developing a policy statement. The DEQ must explicitly engage stakeholders in the development of a policy statement, although how engagement occurs can vary with the circumstances.

Section Three: How Should it Look?

The EAC recognized that a standardized policy statement format would be helpful to the regulated community, but also that it might be difficult to establish one appropriate for all program areas and circumstances. As a result, the EAC decided that while the DEQ need not adopt a standardized format, it should develop a template that ensures critical information is included in each policy statement. All policy statements should be readily available in an easily searchable Web location. Each policy statement needs an explicit disclaimer that it does not have the effect of a regulation.

Section Four: Internal/External Calibration

The EAC discussed a process by which the DEQ evaluates and adjusts a policy statement over time. The EAC agreed that there should not be a sunset date for policy statements. However, each policy statement should include a specific time period for evaluating the effect of the statement.

The EAC discussed whether the nature of the evaluation should necessarily include certain characteristics, such as stakeholder involvement. The EAC agreed that the DEQ should have flexibility to determine the nature of the evaluation, which could be

simply internal, or could be more involved and include stakeholders, depending on experiences with the operation of the policy statement.

The EAC discussed how to treat existing policy statements under the model it is developing. There is an interest in evaluating existing policy statements, but the EAC is reluctant to impose a significant burden on DEQ staff if there would be little benefit. DEQ staff indicated that some divisions have a process for periodic review of policy statements. The fact that an existing statement is not generating controversy can also indicate that it is not problematic.

NEXT STEPS

Frank Ruswick indicated he would talk to Becky Patrick to determine how much information exists at the department or division levels on the number and scope of guidance documents throughout the department.

Frank Ruswick suggested the next step is to draft a report from the EAC based on the chart, initial list of recommendations, and today's discussion. Two members volunteered to develop a draft report.

CLOSING

Frank Ruswick will send out a note seeking member preferences for rescheduling and possibly combining the November and December meetings.

Members preparing the draft report agreed to provide it to Frank Ruswick for distribution to all EAC members by one week from the next meeting date.